LEE KHOI FOO

v.

LIM CHAI HOCK

HIGH COURT, KUCHING
DATUK CHONG SIEW FAI J.
[SUIT NO. KG 33 OF 1992]
3 FEBRUARY 1994

PRACTICE & PROCEDURE: Application for summary judgment - Appeal against decision of SAR dismissing application - Plaintiff's claim based on promissory note - Whether defendant's defence and counterclaim had raised triable issues - Whether existence of counterclaim entitles defendant to stay of execution on judgment.

The plaintiff claimed against the defendant as maker of a promissory note for RM166,053.80 payable to the plaintiff within a year from 14 March 1991. It was not in dispute that demand for payment was made but to no avail. The plaintiffs application for summary judgment was dismissed by the Deputy Registrar and the plaintiff appealed.

The defendant admitted signing the promissory note but contended that it was signed under the mistaken belief that he owed the plaintiff the said sum. He alleged that he had paid the said sum to the plaintiff and denied owing the plaintiff the said sum under the promissory note.

The defendant also filed a counterclaim alleging overpayment to the plaintiff and contended further that there was no consideration for the note sued upon.

Held:

[1] A denial in itself does not constitute a defence in law. A mere denial of the allegations in the statement of claim is not a sufficient traverse of them (O. 18 r. 13(3) RHC 1980). In an action on a promissory note, a defence in denial must deny some matter of fact, for example the drawing, presenting or notice of dishonour of the note.

[2] The plaintiff's action is founded on a bill of exchange, more precisely a promissory note, and the plaintiff and the defendant are immediate parties to the promissory note. The effect of making such a note is an absolute contract between the maker on the one part and the payee on the other part to pay the payee as the instrument may require.

[3] The evidence coupled with the defendant's own admission in paragraph 4 of his affidavit lends weighty support to the point that the allegation of the defendant in paragraph 1 of the defence about the mistaken belief without giving any particulars raises no triable issue at all, bearing in mind that the plaintiff's action is based on the promissory note which the defendant admitted executing.

[4] There was no substance in the defendant's contention that there was no consideration for the note sued upon. Under s. 30(1) of the Bills of Exchange Act 1949, every party whose signature appears on a bill is *prima facie* deemed to have have become a party thereto for value. An antecedent debt constitutes valuable consideration under s. 27(1)(b) of the said Act. On the evidence the defendant has failed to impugn directly any of the items in Exhibit LKF 5 which explains how the sum in the promissory note was arrived at.

[5] The defendant failed to raise any triable issue on the plaintiff's claim based on the promissory note. The Court is to treat the execution of the note as analogous to a payment of cash or as amounting to an independent contract within the wider scope of contracts of sales and purchases in consequence of some of which it was executed and unaffected by any alleged mistake that has not been satisfactorily shown to have any bearing on the bill.

[6] The defendant's counterclaim arose out of quite separate and distinct transactions and there was no connection between the claim and the counterclaim. On the evidence, none of the items in Exhibit LKF 5, constituting the amount in the promissory note sued upon, has been directly impugned and as no special circumstances have been shown to justify the granting of a stay, judgment should be given for the plaintiff without a stay pending the trial of the counterclaim.

[Appeal allowed with costs. Defendant's application for stay of execution of judgment denied].

Cases referred to:

Arab Bank Ltd. v. Ross [1952] 2 QB 216 ***(cit)***
James Lamont & Co. Ltd. v. Hyland Ltd. [1950] 1 KB 585 ***(refd)***
Brown Shipley & Co. Ltd. v. Alicia Hosiery, Ltd. [1966] 1 Lloyd's Rep. 668 ***(refd)***
Ronald Quay Sdn. Bhd. v. Maheswary Sdn. Bhd. [1987] 1 MLJ 322 ***(dist)***
Drake and Fletcher Ltd. v. Batchelor [1986] 130 SJ 285 ***(refd)***

Legislation referred to:
Bills of Exchange Act 1949, ss. 27(1)(b), 30(1)
Rules of the High Court 1980, O. 14, O. 18 r. 13(3)

Other sources referred to:
Byles on Bills of Exchange, 25th Edn., p. 230
Digest of the Laws of Bills of Exchange, Sir MacKenzie Chalmers, 9th Edn.
Supreme Court Practice 1993, Vol. 1, para 18/13/5

For the plaintiff - David Lim; M/s. Wan Ullok, Jugah, Chin & Co.
For the defendant - John Shek; M/s. John Shek & Co.

JUDGMENT

Chong Siew Fai J:
This is an appeal by the plaintiff against the decision of the learned Deputy Registrar dismissing his application for summary judgment for the sum of RM166,053.80 claimed in the action.

By the writ of summons dated 2 April 1992 in this action, the plaintiff claims against the defendant as maker of a promissory note dated 14 March 1991 for RM166,053.80 payable to the plaintiff within one year from 14 March 1991. It is not disputed that demand for payment was made but to no avail.

The defendant filed a defence and counterclaim (though not properly titled in that the heading "Defence And Counterclaim" should have been but was not given at the appropriate place in the pleading). In the section under "Defence" the defendant raised the following 2 points which were subsequently averred to in his affidavit in opposition dated 15 October 1992:

(a) that he signed the promissory note under the mistaken belief that he owed the plaintiff the said sum RM166,053.80. He alleges that he had paid the said sum to the plaintiff;
(b) he denies owing the plaintiff the said sum under the promissory note.

The above points were all that were pleaded by way of defence against the plaintiff's claim.

I shall revert to point (a) later. As regards point (b), it, in itself, does not constitute a defence in law. A mere denial of the allegations in a statement of claim is not a sufficient traverse of them (O. 18 r. 13(3)). In an action on a promissory note, a defence in denial must deny some matter of fact e.g. the drawing, presenting or notice of dishonour (para. 18/13/5 of the **Supreme Court Practice 1993,** Vol. I, citing *Arab Bank Ltd. v. Ross* [1952] 2 QB 216).

In his "Counterclaim" the defendant counterclaims the sum of RM287,876.50 made up as follows (subject, however, to an error of RM0.16 as shown below):

(a)	Under paragraph 6, the difference between RM2,183,995.36 and RM1,933,824.20	= RM250,171.16
(b)	Under paragraph 7, the sum of	RM 15,200.00
(c)	Under paragraph 8, the sum of	RM 22,505.50
		RM287,876.66

Error: RM287,876.66 - RM287,876.50 = RM0.16.

Under paragraph 6 of the "Counterclaim" the defendant alleges to the effect that in the years 1987, 1988, 1989 and 1990, he had paid the plaintiff personally or through the latter's authorised agents (i.e. the plaintiff's brother, Lee Khoi Ted, and the plaintiff's father, Lee Tam) a total sum of RM2,183,995.36 when the commodities supplied were to the total value of RM1,933,824.20.

It is important to note that the plaintiff's action is founded on a bill of exchange, more precisely a promissory note, and that the plaintiff and the defendant are immediate parties to the promissory note. The effect of making such a note is an absolute contract between the maker on the one part and the payee on the other part to pay the payee as the instrument may require.

James Lamont & Co. Ltd. v. Hyland Ltd. [1950] 1 KB 585 decides to the effect that where an action is between the immediate parties to a bill of exchange and the matters relied on by the defendant afford no defence under the Bills of Exchange Act, the judge in chambers, in proceedings under O. 14 may properly, in the exercise of the powers vested in him, give liberty to the plaintiff to sign immediate judgment.

In *Brown Shipley & Co. Ltd. v. Alicia Hosiery, Ltd.* [1966] 1 Lloyd's Rep. 668, it was held that in an action between immediate parties to a bill of exchange, judgment should be given upon the bill as for cash and it was not to be held up by virtue of some counterclaim.

As to how the sum claimed was arrived at and how the promissory note came to be made out,

paragraphs 6 to 9 of the plaintiff's affidavit affirmed on 26 August 1992 are revealing: The total sum of RM171,053.80 in paragraph 6 was from the 13 cheques therein particularised totalling RM156,325. The balance RM14,728.80 was under "Outstanding Bill". The defendant paid RM5,000 on 5 October 1990, thus leaving the balance of RM166,053.80 unpaid (paragraph 7). The promissory note for RM166,053.80 (subject matter of this action) was executed by the defendant after discussions between the parties hereto and paragraph 8 (which is, undisputed) of the plaintiff's said affidavit avers that the defendant admitted the sum RM166,053.80. Exh. LKF 5 shows how the amount RM166,053.80 (the sum mentioned in the promissory note) was arrived at. It was made up from several items (see Exh. LKF 5). The defendant has not shown or even attempted to suggest directly which of the items in Exh. LKF 5 was incorrect or attribute any of his payment to any of the items in Exh. LKF 5. Moreover, the defendant also gave the impression of amassing whatever he could to build up a case: Exh. LKF 5 clearly shows the sum claimed covers the period from 2 May 1990 to 16 January 1991; yet in paragraph 7 of his affidavit made on 15 October 1992, the first 4 items dated 19 January 1990, 9 February 1990, 3 April 1990 and 9 April 1990 were clearly irrelevant to the promissory note sued upon. Furthermore, in paragraph 5 of his affidavit made on 15 October 1992, the defendant admitted that those cheques were given by him in payment of the pigs delivered. He said they were made to Lee Tam as security even though he told the plaintiff that he might not have enough money in his account to honour the cheques. It must be noted that the defendant admitted that the 13 cheques were in payment of the pigs delivered. The defendant did not dispute the cheques but merely told Lee Khoi Foo that he (the defendant) might not have enough money in his account to honour the cheques. The evidence coupled with the defendant's own admission in paragraph 4 of his affidavit dated 15 October 1992 that:

> As the account was kept running all the time, it was not possible for me at any time to be sure how much I was owing them or whether I had overpaid them,

lends weighty support to the point that the allegation of the defendant in paragraph 1 of the defence about the mistaken belief without giving any particulars, raises no triable issue at all, bearing in mind that the plaintiff's action is based on the promissory note which the defendant admitted executing.

For the defendant it was also contended that there was no consideration for the note sued upon. I find no substance in the contention. Under s. 30(1) of the Bills of Exchange Act 1949, every party whose signature appears on a bill is *prima facie* deemed to have become a party thereto for value. An antecedent debt constitutes valuable consideration (s. 27(1)(b) of the said 1949 Act). On the evidence, the defendant has failed to impugn directly any of the items in Exh. LKF 5 which explains how the sum in the promissory note (the subject matter of this action) was arrived at. Moreover, as Sir MacKenzie Chalmers said in his **Digest of the Laws of Bills of Exchange,** 9th Edn.:

> The Courts do not inquire into the adequacy of a *bona fide* consideration. This was always the law as regards consideration other than money, but when the consideration was money the usury laws formerly created a difficulty. This has now been removed. But inadequacy of consideration may be evidence of bad faith or fraud. (**Byles on Bills of Exchange,** 25th Edn., p. 230).

In our instant case no fraud or lack of good faith is pleaded.

As regards the sum of RM15,200 in paragraph 7 of the "Counterclaim" which the defendant apparently had included in his counterclaim of RM287,876.50, this is the total sum allegedly advanced by the defendant to the plaintiff from 1988 to 1990. The defendant contended that this was "a separate arrangement" between him and the plaintiff in the latter's "personal capacity" (see paragraph 7 of the counterclaim). On the basis as pleaded, this would appear to be distinct and separate from the amount under the promissory note, particularly considering that the amount RM166,053.80 under the promissory note was derived from transactions commencing from 2 May 1990 (see Exh. LKF 5 annexed to the plaintiff's affidavit affirmed on 26 August 1992).

As to the sum of RM22,505.50 pleaded in paragraph 8 of the counterclaim, this is alleged to be expenses incurred by the plaintiff

from 1984 to 1991 but paid off by the defendant at the request and on behalf of the plaintiff. Again, there is no suggestion of any connection of this item with any of the items in Exh. LKF 5, the transactions therein, as stated earlier, dating from 2 May 1990.

On the other hand, the promissory note was made on 14 March 1991 and there is, from the plaintiff, evidence, which is uncontroverted, that the amount claimed, RM166,053.80, was admitted by the defendant. During the whole year stipulated for payment in the promissory note, there was, on evidence, no mention by the defendant of any mistaken fact, not even when the plaintiff served him with the letter of demand dated 7 December 1991 (Exh. LKF 7A). It was not until the plaintiff commenced this action on 2 April 1992 that the defendant in his defence alleged signing the promissory note under mistaken belief.

The defence, as pointed out earlier, is bare and short. It merely alleges signing under the mistaken belief that he owed the sum when it had allegedly been paid. Paragraph 14 of his affidavit affirmed on 15 October 1992 states:

> It is while checking through such account over the year from 1984 to 1991 that I discovered that I have in fact overpaid the plaintiff, his brother and his father by RM287,876.50.

No date of the discovery of the alleged mistake was given. It is difficult to believe any ordinary reasonable person would labour under a mistaken impression of owing such a considerably large sum of money and for so long (one year and above).

After considering the defences raised in the defence and counterclaim and the submissions by Counsel and bearing in mind that the plaintiff's action is on a bill of exchange, I am satisfied that the defendant fails to raise any triable issue on the plaintiff's claim based on the promissory note. The Court is to treat the execution of the bill as analogous to a payment of cash or as amounting to an independent contract within the wider scope of contracts of sales and purchases in consequence of some of which it was executed and unaffected by any alleged mistake that has not been satisfactorily shown to have any bearing on the bill.

For the above reasons, I would grant leave to the plaintiff to enter judgment on his claims in the action.

The next question is whether execution on the judgment is to be stayed. For the defendant, Counsel argued that stay ought to be granted, citing *Ronald Quay Sdn. Bhd. v. Maheswary Sdn. Bhd.* [1987] 1 MLJ 322. With respect, I do not think that case is applicable. In that case the claim was on a contract for services rendered; the defendant counter-claimed alleging breach of contractual obligations. In our instant case the plaintiff's action is on a promissory note and between the immediate parties. Bills of exchange are treated as cash. If a counterclaim arises out of quite separate and distinct transactions or there is no connection between the claim and the counterclaim, judgment should be given for the plaintiff without a stay pending the trial of the counterclaim. In *Drake and Fletcher Ltd. v. Batchelor* [1986] 130 SJ 285, the defendant contended that there was a connection between the claim and cross-claim in that they were between the same parties and in respect of the same sort of thing and that there had been a large number of dealings. The Court found as a fact that the counterclaim was a quite separate and distinct transaction and so the defendant was not entitled to a stay of execution pending the determination of his claim. As pointed out earlier, on the evidence in our instant case, none of the items in Exh. LKF 5 constituting the amount in the promissory note sued upon has been directly impugned.

In *Brown Shipley Co. Ltd. v. Alicia Hosiery Ltd., supra*, Lord Denning M.R. said (page 669):

> I do not say that there may not be some cases in which the Court may in its discretion grant a stay of execution. I think it is possible, but, as Sir George Jessel M.R. said in an earlier case (*Anglo-Italian Bank v. Davies* [1878] 38 LT 197) that is only in exceptional circumstances.

No exceptional circumstances have been shown in our instant case.

The appeal is allowed. There shall be judgment for the plaintiff against the defendant in the sum of RM166,053.80 with interest at 8% per annum from today until settlement. There be no stay of execution. There shall also be an order that the defendant pays the plaintiff costs here and before the learned Deputy Registrar; in the absence of an agreement, such costs are to be taxed.